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Legal Issues of Economic Disintegration: government procurement and BREXIT

Kamala Dawar¹

Abstract

This paper examines some of the European Union (EU) and World Trade Organisation (WTO) legal issues that emerge for the United Kingdom's (UK) public procurement law and policies following Brexit. It analyses the consequences and sequencing of international negotiations that will now have to take place because the UK has triggered Article 50(2) of the Treaty on the European Union (TEU). For once the UK revokes the *European Communities Act 1972*, it will no longer be obligated to follow either the Treaty on the Functioning of the European Union (TFEU) or the EU Procurement Directives. Nor will the UK be subject to the commitments the EU has signed up to on behalf of the UK in the WTO Government Procurement Agreement (GPA) and in its Regional Trade Agreements (RTAs).

After looking at the legal issues concerned with sequencing, the paper moves on to assess the domestic, centrifugal forces that will also impact on the UK's public procurement law post Brexit. For under the Devolution Settlement of 1998, the competence for public procurement was devolved down to the regions of Scotland, Northern Ireland, England and Wales. The paper postulates that the legal issues of disintegration that have surfaced under Brexit could potentially fragment a coherent UK wide procurement policy, competition and value for money internally; as well as externally towards the WTO GPA, the EU and other regional procurement agreements.

The paper puts forward a competition approach to address some of the potentially negative consequences of Brexit undermining value for money, transparency and integration in the UK's lucrative markets for government procurement. It concludes with the limited hope that the legal and economic issues and challenges since the UK's referendum on membership of the EU will be a salutatory lesson for all other nations.

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Introduction

Government procurement is both a significant economic and government activity. Since 2006, public procurement has increased 10-fold and the World Bank expects this growth trajectory to continue.² For example, China's government procurement market totalled approximately \$88 billion in 2008, more than triple the amount in 2003. The EU's procurement market was worth over €1500 billion, over 16 per cent of total EU GDP in 2004, and grew to over €2150 billion in 2008.³ In 2013/14, the UK public sector spent a total of £242 billion on procurement of goods and services. This sum accounted for 33% of UK public sector spending⁴ and 13% of GDP,⁵ so ensuring good public procurement policy benefits markets, good governance, citizens and tax payers.

Currently, the UK's procurement laws fall under the application of the EU's 2014 Procurement Directives for Goods and Services, Utilities and Concessions. The EU has also negotiated the coverage of the WTO Government Procurement Agreement on behalf of all 28 EU Member States, and various RTAs, including the EU-Canada CETA with a comprehensive chapter of public procurement provisions. Following Brexit, the UK's Great Repeal Bill seeks to repeal the *European Communities Act 1972* and incorporate current applicable EU law into an Act of Parliament. The government will then decide whether to repeal, amend or retain individual measures from the day the UK officially leaves the EU. So, post-Brexit, the UK will no longer be legally obligated to follow either the EU Directives, nor will it be subject to the commitments the EU has signed up to on behalf of the UK in the WTO GPA or other RTAs. Nevertheless, the paper argues that until Brexit, the UK is not only constrained by its good faith obligations towards the EU, but further that the UK also currently lacks its' own schedules as an independent Member of the WTO, from which it can trade from. This situation poses legal challenges with economic repercussions.

Domestically, the UK's withdrawal from the EU will impact on procurement laws and policies internally, with important consequences for the UK regions of Scotland, Northern Ireland and Wales. For while the Great Repeal Bill converts EU law into national law, it should be recalled that following the Devolution Settlement of 1998, some EU laws relate to competences that have been devolved within the UK down to these regions – and public procurement is one of these devolved competences. Therefore, unless the laws affecting these devolved subjects, including procurement, are unilaterally scrapped by the UK government, the Great Repeal Bill will result in transposing legislation on devolved matters. This could fragment a coherent UK wide procurement strategy towards the WTO GPA, the EU and other bilateral or regional procurement agreements. The paper therefore puts forward a competition response to the fragmentation of procurement laws, policies and markets before concluding that at the very least, the experience of the UK under Brexit should serve as a strong lesson for all other countries.

² Benchmarking Public Procurement. 2016. World Bank Group. piv. Available at: <http://bpp.worldbank.org/~media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2016.pdf>

³ Benchmarking Public Procurement. 2016. World Bank Group. piv. Available at: <http://bpp.worldbank.org/~media/WBG/BPP/Documents/Reports/Benchmarking-Public-Procurement-2016.pdf>

⁴ Lorna Booth. Public Procurement. House of Lords Briefing Paper Number 6029, 3 July 2015.

⁵ Department for Business, Innovation and Skills) (2012a) *No Stone Unturned in Pursuit of Growth*. BIS, London. Cited in Barbara Morton, Gregg Paget, Carlos Mena. What role does Government procurement play in manufacturing in the UK and internationally and how? Cranfield University October 2013. Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/283898/ep24-government-procurement-manufacturing.pdf

Section 1: Sequencing After Brexit: International Law and the Principle of Good Faith

Although since the EU Referendum the UK government has been entering into informal discussions regarding its future trading arrangements – including public procurement - with key third parties, the UK will not possess the legal competence to sign any trade agreement until it has i) withdrawn from the EU and ii) repositioned itself with regard to both the WTO and the EU itself. The UK is constrained by its good faith obligations towards the EU, which are applicable until the UK has detached itself from these laws. Additionally, under WTO rules for both goods and services, every Member is obligated to provide its most favoured nation treatment (MFN) in market access to the other WTO Members. One of the few exceptions to this is through establishing a free trade area (FTA) or customs union that is, among other things, more trade liberalising. It therefore on a practical level, it would be difficult for the UK to attempt to negotiate a preferential FTA without having already formalised the UK's tariff rates or market access levels have must be established under the WTO's most favoured nation treatment for trading.

Using this analysis, the following sections look at the sequencing of the negotiations the UK faces having triggered Article 50 TEU.

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, *the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.* That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties *shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2*, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
- ...
5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.

(Emphasis added)

When the UK government triggered Article 50⁶ pursuant to Article 50(2), the UK entered a two-year window during which it needs to detach itself from the European Union, so that it can then seek to renegotiate a 'New EU-UK Partnership' in its place.⁷ Article 50 TEU is therefore primarily

⁶ Article 50 was triggered by the UK Prime Minister Theresa May on March 29th 2017 in a letter to the European Council President Donald Tusk. See www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50 (accessed 19/09/2017)

⁷ "... we want to have reached an agreement about our future partnership by the time the two year Article 50 process has concluded. From that point onwards, we believe a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new

about withdrawing from the EU, it is not about negotiating trade or procurement commitments - with either the EU or other trading partners.⁸ Indeed, to conclude such agreements before it has withdrawn from the EU would have both legal and operational ramifications.

First, to conclude a trade agreement while the UK is still formally a Member State of the EU would be in breach of Article 3(1)(e) TFEU, which provides the EU with exclusive competence in determining common commercial policy on behalf of its Member States. Serious conflicts of interest would also likely surface, which would also be in breach of TFEU Article 24.3:

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. (Emphasis added)

Moreover, Article 4 TEU emphasizes that

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

....

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. (Emphasis added)

It has been countered that this is the least serious ramification, for the EU would not have many sanctions available to deter or to compel the UK to refrain from such action, this article opines otherwise.⁹ Legally, such a move would conflict with the principle of good faith towards the TFEU until it detaches itself from the EU. Good faith is a fundamental principle of international law codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), which states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."¹⁰ Moreover, without good faith, surely all international law would collapse?

After the UK leaves the EU, the EU will still be the world's largest market and the UK's biggest and nearest trading partner. The EU is more important to the UK's economic well-being than any other trading partner and therefore the UK has an overriding economic interest in accessing the EU market on preferential terms. As such, the UK needs to secure and maintain the good will of the EU to have sufficient time to ensure the best outcomes for the UK's transition away from the EU. This is a significant consideration. Much of the expertise and capacity necessary to manage such multi-dimensional negotiations does not currently exist within the UK – primarily because it has been developed at and for the EU. These specialisms have been developed with the explicit objective of advocating, implementing and developing the EU - they have been not advanced to dismantle it. The principle of good faith emerges here as an important diplomatic tool. For the

arrangements that will exist between us, will be in our mutual interest." UK Government White Paper, 2017.

⁸ Jan Wouters. Brexit and trade: what EU and WTO rules imply. A Bruegel Event. February 6, 2017. <http://bruegel.org/events/brexit-and-trade-what-eu-and-wto-rules-imply/>

⁹ See E. Szyszczak. Triggering Article 50 TEU: a positive result for the government? UKTPO Blog see: blogs.sussex.ac.uk/uktpo/2017/01/26/triggering-article-50-teu-a-positive-result-for-the-government/ (accessed 19/09/2017)

¹⁰ Vienna Convention on the Law of Treaties. 1969. Section i: Observance of Treaties, Article 26. <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

Article 50(3) TEU withdrawal process gives the EU an advantage over the UK - not least because the two-year negotiation period can only be extended by a unanimous European Council decision.

Yet over and above these objections, the UK needs to detach itself from its current position within the EU and reposition itself anew independently under the framework of the WTO. For it is only once this WTO Membership has been formalized that the UK will be able to negotiate a free trade agreement with the EU or any other country or trading bloc. This sequencing has led to a palpable concern surfacing about the period between withdrawal from the EU and re-positioning itself outside of the EU – or ‘cliff edge.’ It is increasingly acknowledged¹¹ that the government needs to provide a transition period of legal certainty until new domestic laws, policies and trading standards have been established. Nevertheless, the Government’s 2017 White Paper categorically stated that the UK’s future relationship with the EU would not be either as a single market or a customs union - for this would entail a common external tariff and the loss of UK’s freedom to negotiate its own trade agreements independently of the EU.¹² It will be an intriguing “new strategic partnership” with the EU, including “a wide reaching, bold and ambitious free trade agreement” and “a mutually beneficial new customs agreement with the EU... .”¹³

1.1 RTAs, the WTO and the UK’s Most Favoured Trading (MFN) Status

The legal framework for negotiating a free trade agreement remains primarily the WTO’s legal exceptions to its MFN obligations in goods and services pursuant to Article XXIV GATT and Article V GATS respectively. Therefore, a crucial initial element of repositioning the UK’s trade terms post-Brexit is going to involve establishing the UK’s MFN commitments at the WTO with all the existing 164 plus Members - including the EU - before it can seek formal regional or bilateral exceptions to these MFN obligations. The UK’s MFN rates are also significant because after Brexit, the UK as an independent WTO member, will have its exports subject to the EU and the other WTO Members’ MFN tariffs. Given that the WTO has made far less progress than the EU in liberalising trade in services (and notwithstanding the high-water mark between bound and applied tariffs), the UK’s services suppliers would have reduced access to EU markets.¹⁴

Some commentators have argued that the UK is already a WTO Member with independent rights and obligations, including those relating to its MFN coverage in goods and services.¹⁵ This seem to be an optimistic interpretation - particularly in the case of services under the GATS schedules, where the UK’s commitments are set out both independently and jointly with the EU. The EU will need to remove the UK’s commitments from its schedules and the UK will need to set out its own schedule of commitments. This is required whether or not the UK’s GATS schedule is certified by other WTO Members or not – simply because the UK needs a schedule from which to trade upon.¹⁶

In sum, it is not until the UK has formally determined its MFN coverage under the WTO and set out its services commitments independently of the EU that the UK can seek to negotiate an RTA or Customs Union covering goods and services, pursuant to the MFN exceptions under the GATT

¹¹ The 2017 UK Labour Party Manifesto states that Labour recognises that leaving the EU with ‘no deal’ is the worst possible deal for Britain and that it would do damage to our economy and trade. We will reject ‘no deal’ as a viable option and if needs be negotiate transitional arrangements to avoid a ‘cliff-edge’ for the UK economy. Published May 16 2017. See: <http://www.labour.org.uk/index.php/manifesto2017/brexit> (accessed 19/09/2017)

¹² This has been an irritant for Turkey under its customs union with the EU. See: K. Dawar & S. Togan. Updating EU-Turkey Trade and Investment Relations?

¹³ Government’s 2017 White Paper, para. 12.2. Note 8.

¹⁴ <http://www.sussex.ac.uk/broadcast/read/36277>

¹⁵ L. Bartels. The UK’s Status in the WTO after Brexit (September 23, 2016). Available at SSRN: <https://ssrn.com/abstract=2841747>

¹⁶ P. Eckhout. House of Commons Briefing Paper: Brexit: the options for trade. para 192.

Article XXIV and GATS Article V – either with the EU or other trading partners. The same sequencing applies to other sectors, which includes - public procurement.

2. The UK as an Independent Party of the WTO Government Procurement Agreement

In terms of the UK's membership of the WTO GPA, it is also only after the UK re-establishes its position under the WTO's multilateral agreements that it can seek to renegotiate its schedules of market access coverage under the plurilateral WTO GPA. This is because the WTO GPA's coverage of the procurement of services has a specific 'relationship of correspondence' with the coverage set out under the GATS schedules - to the extent that the WTO GPA Members cannot make commitments of procurements for certain services - unless they have been previously included under their GATS schedules.¹⁷ That is, the WTO GPA sets up the framework for introducing international competition into procurement markets, transparency and fair award processes and procedures for its signatory parties' tendering contracts for goods and services – it is not responsible for “opening up” markets for the access of such goods or services.

So, it is only once it has set out its independent schedules under the WTO GATT and GATS, that the UK then has the possibility to negotiate its new position in the WTO GPA, or procurement chapters in its RTAs. For as a plurilateral agreement, country needs to join the WTO GPA before it can include procurement chapters in FTAs. However, given that the value of market access under the WTO GPA is greater than any other existing FTA,¹⁸ the UK would access international procurement markets far more quickly and efficiently if it were to join the WTO GPA. It could then use its schedules under the WTO GPA as the basis for improving upon the WTO GPA benchmark during regional and bilateral negotiations.

2.1 The UK's Accession to the WTO GPA

The WTO GPA is a plurilateral agreement housed within the framework of the WTO, with voluntary membership for existing WTO Members. The fundamental aim of the WTO GPA is to mutually open-up government procurement markets to competition among its parties, based on non-discrimination, transparency and integrity. The WTO Secretariat administers the agreement and the WTO Dispute Settlement Mechanism (DSM) is applicable for solving disputes between the parties concerning the implementation of the agreement. Given that the EU was a regulatory pioneer in procurement and advocate of public procurement liberalization under the previous GATT Procurement Codes, the WTO GPA is based on some key EU concepts surrounding the appropriate design and execution of procurement contracts. The 2014 Revised GPA also exhibits the more recent influence of the EU in the design of the right to appeal clauses, the judicial review mechanism, and e-procurement, for these were all part of previous EU legislation. As a result, the current UK procurement regime is highly compatible with the existing GPA legal framework.¹⁹

¹⁷ Dawar, Kamala (2017) *The government procurement agreement, the most-favored-nation principle, and regional trade agreements*. In: Georgopoulos, Aris C, Hoekman, Bernard and Mavroidis, Petros C (eds.) *The internationalization of government procurement regulation*. Oxford University Press.

¹⁸ It is estimated that the GPA parties have opened procurement activities worth an estimated US\$ 1.7 trillion annually to suppliers from GPA parties offering goods, services or construction services. See: www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (accessed 19/09/2017); See Robert D. Anderson, Philippe Pelletier, Kodjo Osei-Lah and Anna Caroline Müller. *Assessing the Value of Future Accessions to the WTO Agreement on Government Procurement (GPA): Some New Data Sources, Provisional Estimates, and an Evaluative Framework for Individual WTO Members Considering Accession*. WTO Staff Working Paper Staff Working Paper ERSD-2011-15. 6 October 2011.

¹⁹ The total value contracted by the 28 Member States of the EU and covered by GPA in 2012 was EUR 283.4 billion. Bilateral UK-EU procurement-related trade can be estimated at around 15% of the total value of procurement, or close to 2.5% of GDP. This includes both direct and indirect cross-border procurement-

Until Brexit, the UK remains a party to the 2014 Revised WTO GPA through its membership of the EU. When the UK leaves the EU, the EU Procurement Directives will no longer be applicable in the UK, even if they continue to be followed. The EU will consequently need to remove the UK's coverage from the EU's WTO GPA schedules by notifying the other parties to the WTO GPA of any proposed modifications to their commitments, pursuant to Article XIX. Under the WTO GPA, Article XIX Modifications and Rectifications to Coverage stipulates that a Party shall notify the Committee of any proposed rectification - whether it be a transfer of an entity from one annex to another, or the withdrawal of an entity or other modification of its annexes to Appendix I. Further, the Party proposing the modification must include evidence as to the likely consequences of the change in its notification. Removing the UK from the EU's schedules will therefore entail re-negotiating the EU's coverage with all the current GPA parties. While the EU's notification to remove the UK's procurement after Brexit is unlikely to be controversial, there will be obvious ramifications caused by the gap in the value of the EU's schedules after the removal of the UK schedules. The EU's need either to modify its schedules and market access commitments on the basis of reciprocity, or compensate the other parties to the WTO GPA on the loss of coverage follow the UK's detachment. The UK alone accounts for 84 % of the total value procured at EU level in awards of more than 100 million euros.²⁰

However, it is unlikely that the UK will be able to simply rollover its current coverage as part of the EU because there are elements of the UK's coverage that are tied into EU procurement directives. For example, under Annex 2, the EU's sub-central government entities coverage includes regional or local contracting authorities. These are bodies governed by public law as defined by the EU procurement directive. However, the Annex only sets out indicative rather than clearly defined coverage for each Member State.²¹ This suggests that before the UK can negotiate its own coverage under the GPA, the UK will again first need to re-negotiate its relationship with the EU.

Once the EU has removed the UK from its schedules and the UK has reset its relationship with the EU, the UK can decide to become an independent party to the WTO GPA and access the significant value of scheduled procurement markets of the 47 countries. However, it is most likely the UK will have to apply to join as with any other accession country. For pursuant to Article XXII of the 2012 WTO GPA Protocol, the 1996 WTO GPA agreement entered into force only for those governments who have, "by signature, accepted the Agreement on 15 April 1994, or have, by that date, signed the Agreement subject to ratification and have subsequently ratified the Agreement before 1 January 1996."²² The UK did not sign this agreement as an individual party, and as a result it is not a separate signatory party to the WTO GPA, with the right to individual membership after Brexit.

2.2 WTO GPA Negotiating Modalities

The WTO GPA depends on highly complex bilateral negotiations between the different Parties and a signatory party is not required to give the same commitments to all trading partners. From its inception, the plurilateral Government Procurement Code sought to address the free-rider problem with conditional reciprocity. The WTO GPA's Annexes²³ are negotiated along four basic

related trade. This is approximately £85 million. Albert Sanchez Graells. Written evidence for UK Parliament. (TAS0083) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-future-trade-between-the-uk-and-the-eu-in-services/written/44483.pdf>

²⁰ Albert Sanchez Graells. Written evidence for UK Parliament. (TAS0083) Op cit.

²¹ See WTO Webpage:

egpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=EuropeanUnion&AnnexNo=2&ContentCulture=en (accessed 19/09/2017)

²² Adoption of The Results of The Negotiations Under Article XXIV:7 of The Agreement on Government Procurement, Following Their Verification and Review, as Required by the Ministerial Decision Of 15 December 2011(GPA/112), Para 5.

²³ The coverage of the Agreement is set out for each signatory party in Appendix I, which is divided into Annexes concerning the specific coverage of the obligations. The Annexes address: 1) central government

parameters, consisting of: i) the value of procurement - covering only contracts estimated to exceed a certain value threshold; ii) the identity of the procuring entity - covering only those listed by each party in its annexes; iii) the type of goods or services procured - consisting of all goods, apart from some expressly excluded by each party, and only services listed by each party in its annexes; and iv) the origin of the goods or services - including only countries that are GPA parties.

Consequently, during WTO GPA negotiations, not only must the UK decide which services and goods and construction are covered by the obligations, but it must also negotiate which contracting authorities or entities will be included in the Annexes and then, additionally, the financial value of the thresholds that will trigger the scope of application of the agreement in each category of procurement. Parties to the GPA also commonly qualify the scope of the coverage of their obligations within their Annexes to Appendix 1. Although this strict reciprocity approach to negotiations addressed the free-rider problem among WTO GPA parties, the OECD has estimated that if the GPA commitments were applied on an unconditional MFN basis, the average level of GPA commitments would be 16% higher in market access value than with strict reciprocity.²⁴

2.3 The WTO GPA and Domestic Policy Objectives: the case of EU SMEs

In the legislative procedure leading to the adoption of the 2014 EU Procurement Directives, one of the main focuses was to improve the participation of SMEs in public procurement covered by the EU rules.²⁵ Approximately 20.8 million SMEs are registered in the EU, representing 99.8% of all enterprises, and SMEs produce more than a half of European GDP. The final 2014 Directive, Recital 2 states that:

'Public procurement plays a key role in the Europe 2020 strategy ... For that purpose, the public procurement rules adopted pursuant to [the 2004 Directive] should be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs)?.

Article 83(3) of the 2014 Directive provides for increased monitoring at the national level and for an obligation on Member States to transmit to the Commission every three years a monitoring report covering information on, *inter alia*, the level of SME participation in procurement contracts. It is therefore surprising that the 2014 Procurement Directives contains few rules that can substantively promote the participation of SMEs in EU level competitions for public contracts. The challenge for the EU is that it is legally constrained by the WTO GPA when promoting or protecting SMEs in those government procurement markets covered by the agreement. For while the WTO provides *ex ante* options for the parties to negotiate to promote their SMEs and various parties have inscribed such possibilities in their Annexes, it is significant for the legality of EU SME promotion in procurement markets, that the EU has not.²⁶

From the very outset of the negotiations to the 1994 WTO GPA, the EU did not seek to negotiate carve out protections from the GPA's obligations for SMEs and it did not aim to negotiate

entities covered by the Agreement; 2) covered sub-central government entities; 3) "other" covered entities (e.g. utilities); 4) goods; 5) services coverage; 6) coverage of construction services; and 7) General Notes.

²⁴ Asako Ueno. Multilateralising Regionalism on Government Procurement. OECD Trade Policy Paper No. 151. 2013.

²⁵ As defined under the Commission recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36). This focus was initiated in the Commission's *Europe 2020 A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 final, and was clearly visible in the *Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final and was one of five main aims in the 2011 Proposal.

²⁶ Dawar, Kamala and Skalova, Monika (2016) *The evolution of EU public procurement rules and its interface with WTO: SME promotion and policy space*. In: Sanchez Graells, Albert and Skovgaard Ølykke, Grith (eds.) *Reformation or deformation of the EU Public Procurement Rules*. Edward Elgar, Cheltenham.

concessions that matched the SME objectives of other parties. This is because the internal EU (then, the European Community) procurement directives were promulgated to liberalize the internal market among its Member States. The rationale underlying the Procurement Directives, and therefore the principles embodied in the Directives, are historically based on trade liberalization.²⁷ Moreover, not only did the EU not fully exercise its potential to exclude SME's from the scope of the access to the EU's public procurement market, EU negotiators rather sought to explicitly discriminate against and penalise the United States (US), Korea and Japan for their promotion of SMEs under their respective GPA Appendix 1 Annexes. The EU's Notes to Annex 1 stipulate that:

The provisions of Article XVIII requiring Domestic Review Procedures *shall not* apply to suppliers and service providers of Japan, Korea and the US in contesting the award of contracts to a supplier or service provider of Parties other than those mentioned, *which are small or medium sized enterprises under the relevant provisions of EU law, until such time as the EU accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses* (emphasis added).²⁸

This historical stance has placed the EU at odds with the policy objectives of most other WTO GPA parties, as well as more recent EU efforts to promote SMEs in procurement markets under the WTO GPA and its RTAs. Under Brexit, the UK has the option of avoiding this legal constraint on promoting SMEs or other horizontal policies through procurement, ex ante, when negotiating its accession terms to the WTO GPA. These negotiations will reset the UK's procurement commitments and exceptions, which can then be built upon in bilateral and regional trade agreements. In effect, the UK is now able to negotiate a comprehensive policy framework to promote SMEs, or other sectors of the economy, in line with other parties such as the US, Japan and S. Korea.

However, given the new decentralised policy space that will emerge following Brexit, it is worth restating that in recent history, the primary objective of procurement policies has been “value for money” as defined as “the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought”.²⁹ This should be achieved through competition, unless there are compelling reasons to the contrary. Promoting horizontal policy objectives through procurement contracts will typically detract from the pursuit of competition and value for money. Careful cost benefit analyses should be undertaken to ensure there are compelling reasons for compromising value for money in public procurement, in the pursuit of secondary or horizontal goals.

This paper therefore now puts forward a competition approach to government contracting, which could be achieved by placing the supervision of public procurement law enforcement within the UK's central competition agency.

3. Options for UK Public Procurement Law and Policy

The UK's procurement policy has been towards promoting competitive, commercial public purchasing. The UK government has noted that public markets are often uncompetitive in that they fail the tests of economic models that require features such as perfect information and low barriers to supplier entry and exit.³⁰ A 2000 White Paper stressed how this was particularly so in the market

²⁷ For discussion, see S. Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies’ (2012) 14 *Cambridge Yearbook of European Legal Studies* 1-47.

²⁸ See: <https://e-gpa.wto.org/report/coverage>

²⁹ See UK Guidance on Public Procurement Policy at: www.gov.uk/guidance/public-sector-procurement-policy

³⁰ UK. Department of Trade and Industry (1998) ‘Our Competitive Future: Building the Knowledge Driven Economy’, 16 December 1998, HMSO, London; UK.

for communications networks where high barriers to entry for new businesses, economies of scope and scale, networks effects, and technical gateways or bottlenecks ... may give their owners market power.³¹ The UK has also been an internal critic of the EU's proposed regulation to impose a price penalty on bids from countries that did not offer strict reciprocity in that procurement market on the grounds that it suppressed competition.³² Overall, the UK has played a positive role in shaping EU procurement rules along commercial rather than bureaucratic lines.³³

Nevertheless, prior to the implementing the EU procurement directives, the UK did not have a significant body of public procurement law or legal rules. Rather it relied in the main on administrative guidance from the Treasury for specific purposes, such as promoting value for money and controlling corruption in procurement processes. It was actually the EU Procurement Directives that brought about a more legal approach in UK procurement practices, through their transposition into domestic law. To the extent that the objective of EU procurement law is to open the internal procurement market to tenderers from all other Member States, this transposition has introduced greater competition and promoted value for money – which is in line with previous UK procurement policy. Under the Great Repeal Act, a pragmatic short-term solution would be to retain current regulations for the award procedures but without conferring their benefits to suppliers from third parties without reciprocal arrangements.

However, more national freedom will affect the UK internally, in its relationship with Scotland, Ireland and Wales. To recall, this is because of the devolution settlement of 1998, when public procurement became an area of responsibility for the devolved governments in Scotland, Wales and Northern Ireland. Following Brexit, the different regions of the UK will no longer be forced to apply the same rules, and different horizontal policy objectives are likely to appear in procurement processes, promoting different local economic development and social objectives. The value of procurement in the regions is significant. Greater policy freedom could lead to a greater divergence between the different regional jurisdictions of the UK. This centrifugal dynamic could operative undermine legal coherence, as well as competition and value for money in post Brexit procurement processes within the UK, particularly if the different regions follow different horizontal policy objectives through their procurement processes.

3.1 Horizontal policy objectives Post Brexit: *The case of SME Promotion*

In UK, there is political pressure to use low-value procurement to promote SMEs. In 2013/14, the UK public sector spent a total of £242 billion on procurement of goods and services; this which some suggest could be used to pursue a variety of public policy aims, such as promoting small and medium-sized enterprises (SMEs) or encouraging local growth. Both objectives were stated aims of the UK's coalition government of 2010-2015, which set and met a target for central government to procure 25% of goods and services by value from small and medium-sized enterprises, in 2013/14. The 2015 Conservative manifesto included a pledge to increase the percentage spent with small and medium-sized enterprises to a third.³⁴

³¹ Department of Trade and Industry Report (2000, December) 'A new future for communications'. HMSO, London.

³² See K. Dawar. The 2016 EU International Procurement Instrument's Amendements to the 2012 Buy European Proposal: A Retrospective Assessment of its Prospects. *Journal of World Trade*. Vol 50:5 September 2016.

³³ For example, in the provisions on framework agreements and competitive dialogue introduced in 2004 and in the introduction or adoption of measures that were of concern to the UK in the 2014 reform process such as the "mutual" exemption and wider use of award procedures involving negotiation. See: Sue Arrowsmith. *Brexit Whitepaper: The implications of Brexit for the law on public and utilities procurement*. Achilles Briefing paper 2016. <https://www.achilles.com/images/locale/en-EN/buyer/pdf/UK/sue-arrowsmith-brexit-whitepaper.pdf>

³⁴ Crown Commercial Services. *Procurement Policy Note – Reforms to make public procurement more accessible to SMEs* Information Note 03/15 18th February 2015. Available at:

Following Brexit, the UK could negotiate certain carve outs for its small medium sized enterprises along the same lines as the US, Japan and S. Korea, and list them in its schedules of market access commitments in the WTO GPA. This would allow certain devolved regions of Wales, Scotland and Northern Ireland to pursue such policies, even if others chose otherwise. To further promote transparency and increase competition, the UK should also set up a centralized electronic data collection system and public tender awards centrally, based on the existing EU TED system, or more advanced e-procurement systems such as in South Korea.

There are also other policy objectives that the devolved regions of the UK may choose to pursue through public procurement awards. A 2013 study based on EU TED data,³⁵ assessing the use of public procurement for promoting the environment – or green public procurement (GPP), social responsible public procurement (SRPP) and public procurement for innovation indicates that the UK is the leader in all three categories.³⁶ Although, the absolute value of these procurements was higher in France and the Netherlands. This suggests that the UK, as the signatory party of any agreements signed in the WTO GPA or FTAs, will need to ensure the legality of such policies not only under their negotiated schedules in any potential membership of the WTO GPA, but also under other multilateral rules including the WTO Agreement on Subsidies and Countervailing Measures and the GATT and GATS National Treatment Obligations.

In the recent *Canada – Feed-in-Tariff*³⁷ and *India – Solar Cells* disputes,³⁸ the local content requirements implemented with the aim of promoting renewable energy were scrutinized under WTO GATT, Trade Related Investment Measures Agreement (TRIMs) and ASCM rules, but not the WTO GPA. This indicates that even if the UK were to negotiate certain exemptions for the purposes of promoting specific industries or regions under the WTO GPA, this will not exempt the measures from other non-discrimination commitments for goods and services under the WTO's multilateral agreements, including the GATT, TRIMs, GATS and ASCM.

4. Promoting Competition: an integrated approach?

There is growing consensus that ensuring non-discriminatory, transparent and fair public procurement is the best way for citizens and tax-payers obtain the best public goods and services available, and at the best value for money. To achieve this aim, more competition is needed in procurement markets. One way to realize this is to bring the competition authority and the procurement agencies closer together. However traditionally, and specifically in the UK, government procurement laws have been perceived as largely focused on eliminating public restrictions to the circulation of goods and services associated with protectionist measures by other governments. Competition law, on the other hand, is perceived as largely focused on private restraints of competition that damage consumers and contestable markets. Under this 'classical' perspective, very limited interaction between competition and government procurement law is envisaged. Both bodies of economic regulation seem to have different objectives and, consequently, seemed to offer weak reasons for their joint study or for the development of consistent rules and remedies.³⁹

www.gov.uk/government/uploads/system/uploads/attachment_data/file/405020/PPN_reforms_to_make_public_procurement_more_accessible_to_SMEs.pdf

³⁵ "Strategic use of public procurement in promoting green, social and innovation policies" Final Report DG GROW Framework Contract N° MARKT/2011/023/B2/ST/FC for Evaluation, Monitoring and Impact Assessment of Internal Market DG Activities.

³⁶ A caveat with these figures is the variable quality of information in the different Member State's TED files.

³⁷ Appellate Body Report, *Canada – Measures Relating to the Feed-In Tariff Program*, 6 May 2013, WT/DS412/AB/R and WT/DS426/AB/R, ¶1.31.

³⁸ Report of the Appellate Body. *India – Certain Measures Relating to Solar Cells and Solar Modules* AB-2016-3 Report of the Appellate Body. WT/DS456/AB/R. 16 September 2016 ¶5.32.

³⁹ Albert Sánchez Graells. "Public Procurement and State Aid: Reopening the Debate?" 21(6) *Public Procurement Law Review*. 2012:205-212.

Nevertheless, the influence of competition's economic principles is evident – most notably in the area of bid rigging amongst tenderers for public contracts.⁴⁰ This field concentrates on the economic impact of procurement on competition, including the so-called *buyer power*.⁴¹ Such work stresses the importance of preventing procurement processes being affected by egregious practices such as collusion, fraud and corruption.⁴² The complexity of the competition effects from procurement markets results in the public sector both promoting and restricting competition, either by helping firms to overcome barriers to entry or by adopting procurement practices that restrict participation or discriminates against particular firms.⁴³ The interdependent nature of competition and procurement laws is also apparent in the impact of government procurement activities in the prospective analysis conducted in merger control cases, or on the impact of subsidies in public markets. These issues determine the competitiveness of markets where the public buyer sources goods, works and services, and can constrain the ability of the public buyer to obtain allocative efficiency and value for money.

In the EU, Article 101 TFEU clarifies the targets of competition law in two stages with the term *undertaking*. Any entity engaged in an economic activity that consists of *offering* goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered an undertaking. To qualify, no intention to earn profits is required, nor are public bodies, by definition, excluded.⁴⁴ In effect, this term is used to describe nearly anyone that is engaged in an economic activity,⁴⁵ except employees⁴⁶ and public services based on "solidarity" for a "social purpose." A *public undertaking*, on the other hand, is an undertaking over which public authorities directly or indirectly exercise dominant influence by their ownership, financial participation, or the rules that govern it.⁴⁷ *Fenin v. Commission*⁴⁸ noted that the Community courts' traditional approach for establishing whether a public body is an undertaking turned on the concurrent application of two tests: (i) the comparative criterion and (ii) market participation tests. The first test focuses on whether the activity of a public body is capable of being performed by private operators. The potentially all-encompassing scope of this first test is reined in by the market participation test. This determines whether those activities are conducted under market conditions. It distinguishes between conduct undertaken with the objective of capitalisation, and those activities pursued solely pursuant to the principle of solidarity. For where the activities of the Member State are typically those of a public authority, they will not be considered an undertaking subject to Article 101 TFEU.

In so far as a public entity undertakes an economic activity that could be separated from the exercise of its public powers, this entity, in relation to that activity, acts as an undertaking. However, if that economic activity could not be separated from the exercise of its public powers, the activities exercised by that entity as a whole, remain activities connected with the exercise of those public powers.⁴⁹ The fact that the product or a service supplied by a public entity and connected to the

⁴⁰ Weishaar, S.E., *Cartels, Competition and Public Procurement*. Edward Elgar. June 2013.

⁴¹ The Bundeskartellamt. *Buyer Power in Competition Law - Status and Perspectives*. See: http://www.bundeskartellamt.de/wEnglisch/Vergaberecht_e/vergaberecht_eW3DnavidW2643.php

⁴² *Public Procurement: The Role of Competition Authorities in Promoting Competition*. The OECD. DAF/COMP. 2007:34.

⁴³ See for example, Laffont, J.-J. and J. Tirole (1994) *A Theory of Incentives in Procurement and Regulation*, MIT Press, London. They contend that procurement is a special case of regulation in which the roles of principal (regulator or designer of contract mechanisms) and buyer are combined; The UK Office of Fair Trading. *Assessing the impact of public sector procurement on competition*. Volume 2 – case studies (OFT742b). September 2004.

⁴⁴ The Commission published this definition on DG Competition's web-site at: http://ec.europa.eu/comm/competition/general_info/u_en.html#t62

⁴⁵ *Höfner and Elser v. Macrotron GmbH* [1991] ECR I-1979 (C-41/90).

⁴⁶ See AG Jacobs, *Albany International BV* (1999).

⁴⁷ A dominant influence of public authorities is presumed when they: a) hold the major part of the undertaking's subscribed capital, b) control the majority of the votes attached to shares issued by the undertaking or c) are in a position to appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

⁴⁸ Case C-205/03 P. Advocate General Maduro in *Fenin v. Commission*.

⁴⁹ Case C-113/07 P, *Selex Sistemi Integrati v. Commission* [2009].

exercise by it of public powers was provided in return for contractual remuneration rather than determined, either directly or indirectly - by that entity - is not sufficient to classify the activity as economic or the entity as an undertaking.⁵⁰

Significantly, this TFEU approach effectively pushed most government procurement activities outside of the application of the competition rules under Articles 101 and 102 TFEU. Government procurement under this approach is deemed to be an ancillary to a non-economic activity, which disqualifies it from the economic activity regulated under Articles 101 and 102 TFEU. This is regardless of the anti-competitive distortions that government procurement activities may affect, and moreover, which may impact both public and open markets. There is, therefore, an asymmetrical approach in the competition rules accorded to EU public and open markets. This undermines a more coherent integrated approach to regulating these markets.

More recent EU case law has moved closer towards an competition approach, in the 2015 *EasyPay* case.⁵¹ Here the Court of Justice of the European Union (CJEU) deviated from the *Fenin* approach when imposing the requirement that economic and non-economic activities must be *inseparably connected* for the latter to exclude the former from competition law analysis.⁵² This built on the approach taken in the *AT Bettercare II* case⁵³ involving the conduct of a local authority in Northern Ireland that was procuring nursing home places from private companies whilst also providing some places itself. The UK Competition (Commission) Appeal Tribunal found that the local authority was acting as an economic undertaking in its purchasing activities – and thus covered by EU competition law. It rejected earlier theories of the UK Office of Fair Trade which, in the approach taken under *Fenin*, sought to split the activities in question between "economic activities" and "non-economic activities" on the basis of a distinction between provision and purchasing, or according to the source of funding used by each resident.

The UK could choose to reinforce the reasoning behind the *EasyPay* and successfully appealed *Cat BetterCare II* judgements, by conclusively departing from the economically and legally fragmented approach taken in the *Fenin* case. It could additionally seek to house the public procurement agency under the supervision of the competition authority. For this could help to ensure that public procurement benefits society and the participants in markets. This would allow for centralized competition analysis of procurement policies in the devolved regions of the UK and serve to ensure a harmonized negotiating policy for external trade agreements. These supervision activities could be prioritized with an orientation towards illegal direct award of contracts. For example, in Sweden, the Public Procurement Act of 2010 provides the Swedish Competition Authority the possibility to take cases of illegal direct award of contracts to court. Moreover, a company that infringes the Competition Act risks being debarred from bidding for procurement contracts. Likewise, in the Czech Republic the Office for the Protection of Competition is the central authority of state administration responsible for creating conditions that favour and protect competition, supervision over public procurement and consultation and monitoring in relation to the provision of state aid. For the UK to follow such an integrated approach would be beneficial, to both competitive open and procurement markets, legal certainty and enforcement – and moreover in an era of legal and economic uncertainty under BREXIT.

⁵⁰ Case C-138/11, *Compass-Datenbank GmbH v. Österreich*.

⁵¹ Judgment in *EasyPay and Finance Engineering*, C-185/14, EU:C:2015:716.

⁵² Sanchez-Graells, Albert and Herrera Anchustegui, Ignacio, Revisiting the Concept of Undertaking from a Public Procurement Law Perspective – A Discussion on *EasyPay* and *Finance Engineering* (November 26, 2015). Available at SSRN: <https://ssrn.com/abstract=2695742> or <http://dx.doi.org/10.2139/ssrn.2695742>.

⁵³ *BetterCare Group Limited v Director General of Fair Trading*. Case number 006/2/1/01. See: <http://www.catribunal.org.uk/237-570/1006-2-1-01-BetterCare-Group-Limited.html> (accessed 19/09/2017)

5. Conclusions

And now I saw, though too late, the folly of beginning a work
before we count the cost, and before we judge rightly of our
own strength to go through with it.
Robinson Crusoe.

This paper has examined the sequencing of negotiations that needs to take place following the unprecedented triggering of Article 50 TEU by an EU Member State. It submits that even if, although highly unlikely, the UK can simply roll-over its existing MFN commitments in the WTO, overlooking joint EU-UK schedules, it will still need to formally reset these with the WTO membership before it can seek to negotiate its accession to the WTO GPA, or other bilateral and regional trade agreements. These negotiations will necessarily involve the EU and could be protracted and highly politicized, particularly if the UK breaches its good faith obligations towards the TFEU before it detaches its Membership. That is, and with specific regards to procurement, while in theory there is little reason why other WTO GPA parties would wish to re-open the existing detailed coverage arrangements with the UK, the other parties - including the EU - must nevertheless agree to the UK's accession and its coverage as set out in its Appendix 1 Annexes.

If the UK were to recast its procurement procedures under the framework of the WTO GPA, it would still have some flexibility to re-calibrate its procurement rules. However, this greater freedom to pursue horizontal policy objectives could also lead to greater divergence between the different regional jurisdictions of the UK - because of the Devolution Settlement of 1998. Such regional diversity could operate to undermine legal coherence; economies of scale, competition and value for money in post Brexit procurement processes within the UK.

This paper submits that one way of checking and balancing these regional developments is to establish coordinated measures to foster competition and value for money in procurement policies. This could include, at the limit, integrating the competition and public procurement agencies together within a single agency competent to address anti-competitive practices such as bid rigging, merger control and State aid that affect both open and public procurement markets. This agency could also seek to coordinate domestic horizontal policy objectives such as SMEs, in procurement processes to ensure that they are proportionate to meet their stated objectives, and do not undermine the very policy objective they intend to meet. It seems, therefore, that the lessons learned from the UK since the EU referendum, is that what should be a discussion concerned with improving competition and value for money in the UK, will more likely be overshadowed by a complex legal process of sequencing negotiations, intra-UK regional jurisdictional divergences, and intractable political, financial and diplomatic legacies with the EU.